Supreme Court, U.S.
FILED
OCT 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-492

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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ROBERT T. DEVEREAUX, et al.,

Petitioners-Appellants

v.

WILLIAM J. GEARY, et al.,

Respondents-Appellees

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ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

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# BRIEF OF STATE RESPONDENTS-APPELLEES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did this Court's opinion in Firefighters Local Union No. 1784 v. Stotts, effect such a clear change in Title VII law that a lower court abused its discretion by denying non-minorities intervention to contest an affirmative action consent decree?
2. Can a separate action by aggrieved third parties be sustained as a collateral attack on a race-conscious affirmative action consent decree?

## PARTIES

This Brief in Opposition is submitted on behalf of the State Respondents-Appellees: Massachusetts Metropolitan District Commission Commissioner William J. Geary, and Superintendent Thomas E. Keough.

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# BRIEF OF STATE RESPONDENTS-APPELLEES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-15a) is reported at 765 F.2d 268 (1st Cir. 1985). The opinion of the

District Court (Pet. 16a-29a) is reported at 596 F. Supp. 1481 (D. Mass. 1984).

## JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1985. The petition for certiorari was filed on September 19, 1985. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This case presents a question of the correct interpretation of the remedial section of Title VII of the Civil Rights Act of 1964, §706(g), as amended, 42 U.S.C. §2000e-5(g) ("Section 706(g)"), reproduced in the petition for certiorari at 30a-31a.

## STATEMENT OF THE CASE

1. The petitioners, five white police lieutenants employed by the Metropolitan District Commission ("MDC"), seek to invalidate an affirmative action consent decree. Their effort is based upon their reading of this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S. Ct. 2576 (1984). Specifically, they challenge the promotion of a black MDC police lieutenant to captain under the terms of a 1979 consent decree entered in Culbreath v. Dukakis, C.A. No. 74-2463-MA (D. Mass.) ("Culbreath decree"). (Pet. 5). That decree, adopted under the conditions set forth below, establishes goals for the hiring and promotion of minority employees within the MDC and four other state agencies in the Massachusetts civil service workforce.

2. In 1974, minority civil service applicants and employees filed a class action pursuant to 42 U.S.C. §§1981 and 1983,[1/] which challenged alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. (Pet. 3, 4a).[2/]

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1/ The plaintiffs' claims in that action were not grounded on Title VII, nor did they allege intentional discrimination. However, prior to resolution of the suit by entry of a consent decree, this Court ruled in Washington v. Davis, 426 U.S. 229 (1979), that plaintiffs must prove intentional discrimination to recover in §1981 and §1983 actions. The parties thus treated the action as one brought pursuant to Title VII, and the consent decree was entered under that statute. 765 F.2d at 270; Pet. 4a n. 1.

2/ That action was initially brought as Jackson v. Sargent, C.A. No. 74-2463-F (D. Mass). One of the original plaintiffs was dismissed from the suit for lack of standing, since he had not actually applied for a civil service position. Jackson v. Sargent, 394 F. Supp. 162 (1975). The dismissal was affirmed in Jackson v. Dukakis, 526 F.2d 64 (1st Cir. 1975).

The plaintiff class was certified and, in December of 1978, state officials entered into a series of factual stipulations[3/] and a consent decree with representatives of the class in settlement of that suit (Pet. 3), and to increase the number of minority civil service employees in the state agencies. That decree was approved and entered by the District Court on August 27, 1979. Culbreath v. Dukakis, C.A. No. 74-2463-MA (D. Mass.). The Culbreath decree sets goals for the appointment and promotion of minorities in civil service job grades

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3/ The factual stipulations set forth in the Culbreath decree, establishing a statistically disproprotionate underemployment of minorities, were acknowledged by the parties to constitute "findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII of the Civil Rights of 1964 . . . ." (Pet. 3, 4a).

one through twenty in agencies within the Boston Standard Metropolitan Service Area for a period of eight years, commencing in January of 1979 and terminating in December of 1987. (Pet. 4a-5a, 18a).

In late 1978 and early 1979, after negotiations for the Culbreath decree were completed but prior to its entry by the District Court, several unions allegedly affected by the proposed decree's provisions moved to intervene in that action. The District Court denied such intervention, and the Court of Appeals affirmed. Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980); Pet. 5a.

3. The current, underlying action was brought upon a new complaint by the petitioners against the Commissioner of the MDC and the Superintendent of the

MDC police force ("the state respondents") on July 16, 1984, to compel them to promote one of the petitioners in accordance with state civil service law. They alleged reverse discrimination by MDC officials in promoting a black MDC police lieutenant to captain in July 1984, pursuant to provisions of the Culbreath decree. (Pet. 5, 6a, 19a).[4/]

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4/ The two non-minority lieutenants ranking first and second on an eligible promotional civil service list had been promoted to captain by the MDC prior to this suit. The five petitioners tied for the third through fifth positions on the list. The black lieutenant promoted was ranked sixth, and was the only minority candidate on an alternate list for promotion in accordance with provisions of the Culbreath decree. (Pet. 5).

While the petitioners assert that state civil service law mandates that one of the top three candidates on a list be promoted (Pet. 5n), that is not entirely accurate. State law also

(footnote continued)

The Culbreath plaintiff class moved successfully to intervene as defendants in this action, and all defendants moved to dismiss. (Pet. 6a, 20a). On November

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(footnote continued)

provides that candidates for promotion ranking highest on a list may be passed over by an appointing authority under certain circumstances. See M.G.L. c. 31, §27. Since that analysis was not necessary in the instant case where a minority was promoted, it has never been determined as a factual matter if any of the petitioners would have been promoted even in the absence of the Culbreath decree. As the courts have observed on more than one occasion, "the interest that a police officer has in a promotion by reason of his position on an eligible list does not rise to the level of a property interest" entitled to constitutional protection. Hussey v. Sullivan, 498 F. Supp. 594, 596-97 (D. Mass. 1980), aff'd, 651 F.2d 74 (1st Cir. 1981); see also Bishop v. Wood, 426 U.S. 341, 345, n. 8 (1976); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir. 1980). Finally, the Eleventh Amendment bars the petitioners from invoking the power of the federal courts to compel the state respondents to comply with state civil service law. Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984).

13, 1984, the District Court allowed the motions to dismiss, characterizing the petitioners' claims as a belated request to intervene in the Culbreath decree, rather than as a separate collateral attack on that decree. (Pet. 6, 6a-7a). The petitioners appealed.

On June 24, 1985, the Court of Appeals entered judgment affirming the District Court. Consistent with the lower court, the Court of Appeals treated the petitioners' separate action as an attempt to intervene in Culbreath, and found that this Court's decision in Stotts did not constitute such a clear change in Title VII law as to render the denial of intervention an abuse of the District Court's discretion. (Pet. 6, 1a-15a).

## REASONS FOR DENYING THE WRIT

The petitioners' claims are twofold. First, they wish to intervene in an eight-year consent decree entered in 1979, asserting that this Court's decision in Firefighters Local Union No. 1784 v. Stotts effected such a significant change in Title VII law as to warrant intervention. Alternatively, they attempt to attack the decree collaterally, on the grounds that constitutional due process and principles of res judicata and collateral estoppel mandate that a non-party cannot be bound by an earlier decision. For the reasons stated below, the petitioners are wrong on both counts. Since this Court has granted certiorari to hear arguments this term in several cases which together are likely to resolve the issues raised in the present

petition, it is unnecessary to review this case as well.

## I. THE COURT OF APPEALS' DECISION THAT THERE HAS BEEN NO CLEAR CHANGE IN TITLE VII LAW WAS CONSISTENT WITH DECISIONS OF ALL OTHER CIRCUIT COURTS, INCLUDING THOSE AFFIRMATIVE ACTION CASES IN WHICH CERTIORARI HAS BEEN GRANTED THIS TERM.

In its decision, the Court of Appeals agreed with the District Court that "Stotts (which dealt with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes Stotts as not invalidating such a decree." 765 F.2d at 269; Pet. 3a. Since the Stotts decision did not so clearly define a federal court's remedial authority under Title VII, the Court of Appeals was correct

in denying the petitioners relief by vacating the Culbreath decree.

While the petitioners cite language in Stotts to advance their position that only actual victims of discrimination can obtain Title VII relief, they can point to no subsequent judicial decisions to buttress that interpretation. In this case, the Court of Appeals followed the lead of all other circuit courts which have dealt with Stotts challenges to existing consent decrees, and have held that Stotts does not affect their continuing validity.

Significantly, this Court has granted certiorari to hear arguments this term in three cases involving affirmative action. Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom, Local

No. 93, International Association of Firefighters v. City of Cleveland, ___ S. Ct. ___, 54 U.S.L.W. 3223 (October 8, 1985) (No. 84-1999); Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted ___ U.S. ___, 105 S. Ct. 2015 (1985); Local 638 v. Equal Employment Opportunity Commission, 753 F.2d 1172 (2nd Cir. 1985), cert. granted, ___ S. Ct. ___, 54 U.S.L.W. 3223 (October 8, 1985) (No. 84-1656).

In Vanguards, supra, a union challenged an affirmative action consent decree entered in settlement of class action litigation, asserting that it penalized innocent non-minority firefighters under the Fourteenth Amendment. Analyzing the merits of its claim under Title VII, the Sixth Circuit held that for the plan embodied in the consent

decree to be valid, it must be reasonably related to the objective of remedying prior discrimination, allow only qualified minorities to be hired or promoted, not require the discharge and replacement of non-minority workers or create an absolute bar to their advancement, and must be temporary in nature and terminate when the underrepresentation of minorities has been corrected. 753 F.2d at 484, citing Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). Those same terms are met in the Culbreath decree.

Like the Court of Appeals in the present case, the Sixth Circuit in Vanguards held that Stotts was distinguishable as a matter of law, since it involved a court order entered over the objections of the public employer and outside the scope of the consent decree

itself. 753 F.2d at 486. Examining the extent to which Stotts may have defined the remedial relief available under Title VII, §706(g), the Sixth Circuit concluded that, while Stotts clearly limits the relief which a court may order, it does not forbid an employer from entering into a consent decree. Id. at 487.

Similarly, in Wygant, supra, the same circuit court upheld a voluntary race-conscious affirmative action plan developed during the collective bargaining process. Stating that the majority in Stotts "specifically declined" to decide the validity of such a plan, 746 F.2d at 1158, the court found that it did not violate the equal protection clause or Title VII even in the absence of direct findings of discrimination.

In Local 638, supra, the trial court's imposition of an affirmative action plan on a union after trial was affirmed by the Second Circuit. That court rejected the argument "that Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination."

The court distinguished Stotts on the grounds that its discussion of §706(g) related only to "make whole" relief ordered by the district court, and did not address the type of prospective relief ordered in Local 638. 753 F.2d at 1185-1186.

Other circuits have distinguished Stotts on that point as well. See Grann v. City of Madison, 738 F.2d 786, 795, n. 5 (7th Cir. 1984) (Stotts concerned with power of district court to modify decree over city's objection where no

finding of actual discrimination, yet "did not hold that non-minority employees can attack a consent decree that remedies the effects of proven discrimination");[5/] Diaz v. American Telephone and Telegraph Co., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (Stotts does not undermine group-rights goals of Title VII, but holds that court may not modify preexisting consent decree to divest another group of employees of entitlements under bona fide seniority system).

It is clear that the Court of Appeals' decision in this case was in line

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5/ See also Britton v. South Bend School Corporation, 35 F.E.P. Cases 1527, 1531 (N.D. Ind. 1984) (affirmative action plan forbidding minority layoffs, incorporated into both collective bargaining agreements and "consent order" entered as settlement in prior action, "reasonable" under Fourteenth Amendment).

with those of other circuits in upholding affirmative action decrees in the aftermath of Stotts. As the court noted, whether a majority of this Court would go so far as to outlaw the race-conscious affirmative action decree in the present case "is not easy to determine from the plurality opinion in Stotts. . . ." 765 F.2d at 274.

While there has yet been no dissension among the circuits concerning the impact of Stotts on affirmative action consent decrees, it is indeed possible that the Wygant decision may "shed more light in this area." 765 F.2d at 275. In fact, the broad spectrum of race-conscious affirmative action plans considered in the three cases in which certiorari has already been granted, will certainly ensure any necessary clarification of Stotts. Of the three, Vanguards is

closest factually to the present matter in that it questions the authority of a federal court, under §706(g) of Title VII, to enter a consent decree in settlement of class action litigation.

In sum, it is clear that the Court of Appeals made the correct decision to leave the Culbreath decree intact pending further guidance. Whatever action this Court takes in Vanguards, Wygant and Local 638, those decisions are likely to have a profound impact on the merits of this and other pending cases. To this end, it would be in the interests of all parties for this Court to hold the petition for certiorari in this action pending their outcome.

## II. THIS CASE DOES NOT WARRANT REVIEW OF THE COLLATERAL ATTACK DOCTRINE.

While the petitioners urge this Court to grant certiorari to "lay to rest" the collateral attack doctrine (Pet. 12), such a grant is unnecessary. First, there is no significant split among the circuit courts concerning either the constitutionality of that doctrine or its consistency with the procedural doctrines of issue preclusion. Even more important, just as this Court need not reach the collateral attack question, neither the District Court nor the Court of Appeals relied on that doctrine to dispose of the petitioners' claims in this case. Since this Court's decisions in Vanguards, Wygant and Local 638 are likely to resolve the validity of a race-conscious affirmative action decree, and thus the merits of this

action, it is unnecessary to hear the petitioners' collateral attack claims. Nevertheless, the state respondents address those claims below.

As this Court has noted in criminal matters, the strong interest in preserving the finality of judgments must be overcome before collateral relief can be justified. Henderson v. Kibbe, 431 U.S. 145, 154 n. 13 (1977), citing Schneckloth v. Bustamonte, 412 U.S. 218, 256-266 (1972) (Powell, J., concurring). Indeed, a final judgment is presumed valid, and will withstand such attack unless the lower court lacked jurisdiction. Hill v. United States, 284 F.2d 754, 756 (9th Cir. 1960), cert. denied, 365 U.S. 873, cert. denied, 368 U.S. 995, cert. denied, 371 U.S. 846 (1962).

The petitioners' reliance on a single case, United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983), is plainly insufficient to support their position where the vast weight of circuit authority contradicts it. Even in Jefferson County, however, the Eleventh Circuit noted that:

> There are . . . limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties. 720 F.2d at 1518.

While that court appeared to reject the "impermissible collateral attack" position assumed by all other circuits, its dicta carried little impact. Since the Eleventh Circuit affirmed the district court's denial of intervention to the Jefferson County plaintiffs, its comments on collateral attack were not dispositive

in any substantive manner.

By contrast, the other circuit courts have applied the general rule that final judgments are not open to collateral attack by third parties to consent decrees as well. The impermissibility of such attacks has been addressed by a number of courts. A consent decree, the Sixth Circuit noted, "although founded on an agreement of the parties, is a final judgment." Vanguards, supra at 484, citing Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983).

Allowing later collateral attack by disappointed third parties adversely affected by a decree would undermine an employer's motivation to settle discrimination cases, and would reopen old claims every time a new group of victims was made whole. Equal Employment

Opportunity Commission v. McCall Printing Corporation, 633 F.2d 1232 (6th Cir. 1980). Absent bad faith, that court noted, a "conciliation agreement and consent decree cannot form the basis of a valid Title VII action" by non-minorities. 633 F.2d at 1237. Other circuit courts are in accord with this reasoning. Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694, 695 (9th Cir. 1981) (nonminority collateral attack on affirmative action consent decree impermissible); Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir. 1984) (white employees cannot maintain action challenging state agency's affirmative action order, just as there can be no collateral attack on a consent decree). See also Freeze v. ARO, Inc., 503 F. Supp. 1045 (E.D. Tenn. 1980)

(consent decree settling claims of black employees cannot be basis for collateral Title VII suit by whites).

Consistently, the Fifth Circuit has noted that to permit a collateral attack "would clearly violate the policy under Title VII to promote settlement." Thaggard v. City of Jackson, 687 F.2d 66, 69 (5th Cir. 1982) (affirmative action consent decree not subject to collateral attack); United States v. Kellum, 523 F.2d 1284, 1287 (5th Cir. 1975); Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 498 (5th Cir. 1968); Hefner v. New Orleans Public Service, Inc., 605 F.2d 893, 898 (5th Cir. 1979) (attack on consent decree would severely undercut important notions of judicial efficiency and finality of judgment); see also Austin v. Dekalb County, Department of Public Safety, 572 F. Supp. 479 (D.C. Ga.

1983) (consent decree not subject to collateral attack). It "would also result in continued uncertainty for all parties involved and render the concept of final judgments meaningless." Thaggard, supra; Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D. N.Y. 1977), aff'd without opinion, 573 F.2d 1294 (2nd Cir. 1977), cert. denied, 436 U.S. 922 (1978).

In an action procedurally similar to the present case, the Third Circuit affirmed the dismissal of a separate action challenging the terms of consent decrees entered in settlement of a suit, as an impermissible collateral attack on the decrees themselves. National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3rd Cir. 1984). Where parties had an adequate opportunity to intervene

previously, they were precluded from relitigating the same issue by a separate action. 744 F.2d at 971-972. By an earlier decision of that circuit, Society Hill Civic Association v. Harris, 632 F.2d 1045 (3rd Cir. 1980), property owners were also barred from challenging by separate action a consent decree which adversely affected them, even though they did not seek to join an unsuccessful intervention motion with other property owners before the decree was signed. Both National Wildlife and Society Hill are instructive in the present case, since the petitioners here had a prior opportunity to join the unions' intervention request in Culbreath v. Dukakis

more than five years ago.[6/]

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6/ Consistent with the decisions of those circuits, the First Circuit had observed on an earlier occasion in Culbreath v. Dukakis, 630 F.2d 15 (1980), that:

> Collateral attack on the decree will be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree. 630 F.2d at 22 (citations omitted).

Since the present petitioners had an opportunity to engage in that earlier litigation, they were also collaterally estopped from bringing their separate action challenging the provisions of the Culbreath decree.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be held by this Court pending its decisions in Vanguards, Wygant, and Local 638.

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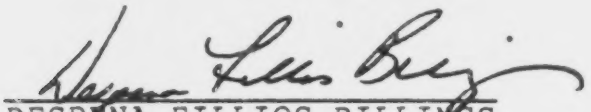

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